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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, deceased, Respondent.

PETITION FOR REHEARING

REUBEN R. ARNOLD,
Counsel for Respondent.

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Now comes the above named Olivia Cox Lunsford, administratrix of the estate of J. M. Cox, deceased, and presents this her petition for rehearing of the above entitled cause (in which judgment of reversal was rendered March 2, 1936), and in support thereof respectfully shows:

1.

Respondent urges that the only evidence in the record that the watchman was an experiment was that of Madden, superintendent, which was a statement of said Madden not subjected to cross-examination but admitted in evidence by agree-

ment (record page 93), and that the other evidence as to an experiment was that of Goff, petitioner's master mechanic (record page 74); that the conclusions of both of these witnesses were mere conclusions and in themselves were of no more value as evidence than if a witness for the respondent had testified that under the facts stated the watchman was not an experiment; that the question of whether the watchman was an experiment should be determined by the facts as to the appliance, which are shown by the photographs in the record, by the drawings in the record, and by the evidence of the witness Goff (beginning on page 74) and of the witness Goree (record page 48); that these facts as to the existence, application, and use of the watchman should control rather than the conclusions of two interested witnesses,—one, defendant's superintendent, and the other, defendant's master mechanic; that these facts showed that the appliance had been used for from five to seven years and was in use on all defendant's passenger engines on that division; that the use of the same was increasing; that the same was used on these engines in service out upon the railway in the transportation of passengers and freight; that employees in train service knew of the presence of this appliance upon engines; that it was a use of the air brake line upon the contingency that the front trucks jumped the track; that it applied the air just as any other valve being opened applies the air, and upon the same principle that it is applied from the engineer's seat in the cab; that employees had a right to rely upon its working; that petitioner's liability grows out of the fact that this fixture on the engine became a part and appurtenance thereof; that as to its being in an experimental stage, many of the other appliances (even considered standard appliances) upon the locomotive are doubtless in an experimental stage, as the inventions of science are constantly causing changes in equipment for better things which are discovered; that the master mechanic had testified the front truck would drop, in case of derailment, the height of the rail to the ties; that if the frame-

work came in contact with the trigger of the watchman it would appear that it would have to work and set the brakes (see record pages 77, 80, 81), and petitioner introduced no evidence as to the condition of watchman after the wreck.

2.

Respondent submits that the question of whether the conclusion drawn by the witnesses Goff and Madden that this appliance was an experiment was justified by the evidence became a question of fact for the jury under all the circumstances in the case, and that the judge fairly submitted to the jury the issue made by defendant's answer that the watchman was an experiment, and that the judge ch ged the jury that if its use was simply as an experiment and the decedent was not authorized, as a reasonably prudent man, to rely on its operation at this time, its failure to work or perform its functions could not be charged against the defendant as negligence and defendant would not be liable for a failure on the part of the device to work properly (record pages 148, 149); and the judge's charge to the jury that the appliance was required by the Boiler Inspection Act to be in proper condition was based upon the proposition that if the jury should find that it became a fixed and permanent part of the locomotive, that it was held out to the decedent as a reliable device and that it could be relied upon to function and that any prudent man would have relied on the device under all the circumstances of the case, and that it had been used so generally and for such length of time that it became a part and appurtenance of the engine (as see the record page 149),—that in these events and under these conditions, the Boiler Inspection Act would apply. Respondent submits that under the circumstances, the submission of this contention to the jury as a question of fact was all that the petitioner was entitled under the law to ask. Respondent submits that the language in the opinion, "Upon the evidence, beyond reasonable doubt, the watchman was in the experimental stage," is a recognition that

this proposition depended on the evidence. It is our contention, respectfully submitted, that substantial evidence in favor of the plaintiff, upon this issue, was sufficient to authorize submission of this issue to the jury under proper instructions, which, we contend, were given, upon evidence as above shown, and that having been thus submitted, the verdict in favor of the plaintiff should not be disturbed, and respondent here quotes a portion of the charge (as appears on pages 148 and 149 of the record and on page 15 of respondent's principal brief):

> "The defendant contends that the device known as Wright's Little Watchman is really in an experimental state, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly."

3.

Respondent respectfully insists that petitioner's contention on page 37 of its supplemental brief as follows: "We do not

contend that where the railroad voluntarily installs on a locomotive a device not required by the Commission's rules, it would not be liable under the negligence rule of the Employer's Liability Act if negligent installation or negligent failure to maintain should proximately cause injury,"—would require application of the Boiler Inspection Act to the same device under the following language of the decision in B. & O. R. R. v. Groeger, 266 U. S. on page 528, which lays down as to section 2 of the Boiler Inspection Act, "By the last mentioned section defendant was bound absolutely to furnish what before under the common law it was its duty to exercise ordinary care to provide."

4.

Respondent respectfully submits that the watchman was a part of the locomotive; that it was an adaptation of the air brake to an additional definite use; that train employees, who were more closely concerned than any others, were given no notice that this appliance was an experiment upon which no reliance could be placed; that it had been used for years; that it was on all passenger engines; and it is respectfully contended that the rule on page 60 of the Commission's book of rules (page 23 of brief) reading as follows:

> "It must be known before each trip that the brakes on locomotive and tender are in safe and suitable condition for service; that the air compressor or compressors are in condition to provide an ample supply of air for the service in which the locomotive is put; that the devices for regulating all pressures are properly performing their functions; that the brake valves work properly in all positions; and that the water has been drained from the air-brake system;"

—applies to said appliance, and that rule 102 (page 21 of brief) reading as follows:

> "The mechanical officer in charge, at each point where repairs are made, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction. He must know that inspections are made as required and that the defects are properly repaired before the locomotive is returned to service,"

—applies to said appliance, and also, that irrespective of said rules, the language of the Boiler Inspection Act, in requiring all parts and appurtenances of locomotive and boiler to be in proper condition, applies to the watchman.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Court of Appeals of Georgia be, upon further consideration, affirmed.

Respectfully submitted,

REUBEN R. ARNOLD,

Counsel for Olivia Cox Lunsford, Administratrix Estate of J. M. Cox, deceased, Respondent.

CERTIFICATE OF COUNSEL

I, Reuben R. Arnold, counsel for the above named Olivia Cox Lunsford, administratrix of the estate of J. M. Cox, deceased, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Reuben R. Arnold

Counsel for Olivia Cox Lunsford, Administratrix Estate of J. M. Cox, deceased, Respondent.